CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 SEPTEMBER 15, 1993 NO. 37

This issue contains:

AVAILABILITY OF BOUND VOLUMES
See inside back cover for ordering instructions

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

U.S. Customs Service

Treasury Decisions

(T.D. 93–68)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR AUGUST 1993

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

Greece drachma:

August 2, 1993	$0.004154
August 3, 1993	.004197
August 4, 1993	.004202
August 5, 1993	.004171
August 6, 1993	.004195
August 9, 1993	.004218
August 10, 1993	.004181
August 11, 1993	.004156
August 12, 1993	.004155
August 13, 1993	.004174
August 16, 1993	.004184
August 17, 1993	.004235
August 18, 1993	.004233
August 19, 1993	.004234
August 20, 1993	.004239
August 23, 1993	.004215
August 24, 1993	.004237
August 25, 1993	.004214
August 26, 1993	.004254
August 27, 1993	.004250
August 30, 1993	.004244
August 31, 1993	.004244

FOREIGN CURRENCIES–Daily rates for countries not on quarterly list for August 1993 (continued):

South Korea won:

August 2, 1993	$0.001235
August 3, 1993	.001235
August 4, 1993	.001235
August 5, 1993	.001236
August 6, 1993	.001235
August 9, 1993	.001232
August 10, 1993	.001231
August 11, 1993	.001233
August 12, 1993	.001231
August 13, 1993	.001230
August 16, 1993	.001231
August 17, 1993	.001229
August 18, 1993	.001229
August 19, 1993	.001230
August 20, 1993	.001229
August 23, 1993	.001228
August 24, 1993	.001229
August 25, 1993	.001230
August 26, 1993	.001231
August 27, 1993	.001232
August 30, 1993	.001232
August 31, 1993	.001232

Taiwan N.T. dollar:

August 2, 1993	$0.037120
August 3, 1993	.037122
August 4, 1993	.037108
August 5, 1993	.037109
August 6, 1993	.037121
August 9, 1993	.037107
August 10, 1993	.037099
August 11, 1993	.037106
August 12, 1993	.037104
August 13, 1993	.037106
August 16, 1993	.037093
August 17, 1993	.037101
August 18, 1993	.037099
August 19, 1993	.037100
August 20, 1993	.037099
August 23, 1993	.037096
August 24, 1993	.037094
August 25, 1993	.037092
August 26, 1993	.037097
August 27, 1993	.037097
August 30, 1993	.037130
August 31, 1993	.037125

Dated: September 1, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93–69)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR AUGUST 1993

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 93–49 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: None.

Belgium franc:	
August 2, 1993	$0.026896
Denmark krone:	
August 10, 1993	$0.143926
August 11, 1993	.143277
August 12, 1993	.141393
August 13, 1993	.141243
August 16, 1993	.143215
August 17, 1993	.143410
August 18, 1993	.144875
August 19, 1993	.144949
August 23, 1993	.144144
August 24, 1993	.145001
August 25, 1993	.144613
August 30, 1993	.144928
France franc:	
August 12, 1993	$0.165399
August 13, 1993	.165125
Japan yen:	
August 13, 1993	$0.009787
August 16, 1993	.009891
August 17, 1993	.009847
August 18, 1993	.009843
Portugal escudo:	
August 2, 1993	$0.005587
August 3, 1993	.005767
August 4, 1993	.005774
August 5, 1993	.005747
August 6, 1993	.005779
August 9, 1993	.005741
August 10, 1993	.005674
August 11, 1993	.005675
August 12, 1993	.005658
August 13, 1993	.005683

FOREIGN CURRENCIES—Variances from quarterly rates for August 1993 (continued):

Portugal escudo (continued):

August 16, 1993	$0.005757
August 17, 1993	.005747
August 18, 1993	.005797
August 19, 1993	.005845
August 23, 1993	.005809
August 24, 1993	.005851
August 25, 1993	.005829
August 26, 1993	.005853
August 30, 1993	.005845
August 31, 1993	.005834

Spain peseta:

August 2, 1993	$0.007040
August 3, 1993	.007210
August 4, 1993	.007203
August 5, 1993	.007184
August 6, 1993	.007176
August 9, 1993	.007102
August 10, 1993	.007030
August 11, 1993	.007035
August 12, 1993	.007018
August 13, 1993	.007050
August 16, 1993	.007153
August 17, 1993	.007135
August 18, 1993	.007197
August 19, 1993	.007318
August 23, 1993	.007313

Sri Lanka rupee:

August 12, 1993	N/A
August 30, 1993	N/A
August 31, 1993	N/A

Sweden krona:

August 12, 1993	$0.122549
August 13, 1993	.122249
August 30, 1993	.123229
August 31, 1993	.122324

Thailand baht (tical):

August 12, 1993	N/A

Dated: September 1, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 9–1993)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of July 1993 follow. The last notice was published in the CUSTOMS BULLETIN on August 11, 1993.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: August 27, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

08/25/93 U.S. CUSTOMS SERVICE PAGE 1
08:49:04 IPR RECORDATIONS ADDED IN JULY 1993 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9300249	19930709	20130709	AQUA-WORLD	MASAUDAYA CORPORATION	N
COP9300250	19930721	20130721	SOPHIA HAND MADE LACE PILLOW SHAM WITH BATTENBURG LACE	L. KEE & CO., INC.	N
COP9300251	19930722	20130722	DEBBIE THE HAPPY DINO	HIP YICK INTERNATIONAL, INC.	N
COP9300252	19930722	20130722	DONNY & DEBBIE THE HAPPY DINOS	HIP YICK INTERNATIONAL, INC	N
COP9300253	19930722	20130722	BATTLE DINOS	HIP YICK INTERNATIONAL, INC.	N
COP9300254	19930722	20130722	DANCING HAPPY DINOS	HIP YICK INTERNATIONAL, INC.	N
COP9300255	19930722	20130722	LITTLE PRINCESS PERSIANA	BEST CONSUMER PRODUCTS, INC.	N
COP9300256	19930722	20130722	PRINCESS PERSIANA	BEST CONSUMER PRODUCTS, INC.	N
COP9300257	19930722	20130722	LITTLE ALADDIN	BEST CONSUMER PRODUCTS, INC.	N
COP9300258	19930722	20130722	ALADDIN	BEST CONSUMER PRODUCTS, INC.	N
COP9300259	19930722	20130722	GENIE	BEST CONSUMER PRODUCTS, INC.	N
COP9300260	19930727	20130727	ANIMANIACS FAMILY ALBUM STYLE GUIDE (1993)	WARNER BROS.	N
COP9300261	19930727	20130727	ANIMANIACS FAMILY ALBUM STYLE GUIDE (1993)	WARNER BROS.	N
COP9300262	19930727	20130727	TOY SUCTION BALL	TONY CHINE	N
COP9300263	19930727	20130727	APPLE SCENTED CANDLE	GIFTCO INC.	N
COP9300264	19930727	20130727	SAWTOOTH WEDDING RING, STYLE 876	ARCH ASSOCIATES, INC.	N
COP9300265	19930728	20130728	SONOMA #499301	AVON HOME FASHIONS, INC.	N
SUBTOTAL RECORDATION TYPE			17		
TMK9300458	19930715	20030106	SENNENKO & DESIGN	KOTAKE SHOKAI, LTD	Y
TMK9300459	19930715	20021201	EDISON TECHNOLOGIES	SHAHRAM BIDSAL	Y
TMK9300460	19930715	20020921	GANT	CRYSTAL APPAREL, INC.	N
TMK9300483	19930701	20020630	BARNEY	LYONS PARTNERSHIP, L.P.	N
TMK9300484	19930701	20020908	BARNEY AND DINOSAUR/SPOTLIGHT DESIGN	LYONS PARTNERSHIP, L.P.	N
TMK9300485	19930701	20030223	BARNEY & FRIENDS STYLIZED	LYONS PARTNERSHIP, L.P.	N
TMK9300486	19930701	20030330	BARNEY & FRIENDS DESIGN	LYONS PARTNERSHIP, L.P.	N
TMK9300487	19930701	20030209	TRAPEZOID DESIGN	REEBOK INTERNATIONAL, LTD.	N
TMK9300488	19930702	19950715	SALVATORE FERRAGAMO	SALVATORE FERRAGAMO FIRENZE SPA	N
TMK9300489	19930702	20050604	FERRAGAMO STYLIZED	SALVATORE FERRAGAMO FIRENZE SPA	N
TMK9300490	19930702	20020428	FERRAGAMO & BUCKLE DESIGN	SALVATORE FERRAGAMO FIRENZE SPA	N
TMK9300491	19930708	20050625	CAP DESIGN	BLUE BELL, INC.	N
TMK9300492	19930708	20050910	RED KAP INDUSTRIES & DESIGN	BLUE BELL, INC.	N
TMK9300493	19930708	20090214	RED KAP INDUSTRIES & DESIGN	BLUE BELL, INC.	N
TMK9300494	19930708	20090117	PURE-FUME	AVEDA CORPORATION	N
TMK9300495	19930708	20030308	AVEDA STYLIZED	AVEDA CORPORATION	N
TMK9300496	19930708	20090214	CONFIXOR	AVEDA CORPORATION	N
TMK9300497	19930708	20070607	AVEDA ESTHETIQUE	AVEDA CORPORATION	N
TMK9300498	19930708	20090613	AROMAOLOGY	AVEDA CORPORATION	N
TMK9300499	19930708	20020121	CURESSENCE	AVEDA CORPORATION	N
TMK9300500	19930708	20000213	SHAMPURE	AVEDA CORPORATION	N
TMK9300501	19930708	20020616	AVEDA BOTANICAL KINETICS	AVEDA CORPORATION	N
TMK9300502	19930709	20030209	PRO PLAYER	DANIEL YOUNG INTERNATIONAL CORP.	N
TMK9300503	19930712	20041106	GONDOLA	TOSI TRADING COMPANY	Y
TMK9300504	19930712	20010205	GONDOLA & DESIGN	TOSI TRADING COMPANY	N
TMK9300505	19930712	20020417	GONDOLA	TOSI TRADING COMPANY	Y
TMK9300506	19930712	20030420	GONDOLA	TOSI TRADING COMPANY	Y
TMK9300507	19930712	20020623	GONDOLA	TOSI TRADING COMPANY	Y
TMK9300508	19930713	20000102	CLARINS	F.C.F., INC.	Y

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9300509	19930713	20020824	MOMO STYLIZED	MOMO S.P.A.	N
TMK9300510	19930721	20030413	DESIGNGARD	HUDSON OPTICAL CORPORATION	N
TMK9300511	19930721	20011217	TRESOR LANCOME STYLIZED	LANCOME PARFUMS ET BEAUTE & CIE	N
TMK9300512	19930721	20030105	TRESOR LANCOME STYLIZED AND BOTTLE DESIGN	LANCOME PARFUMS ET BEAUTE & CIE	N
TMK9300513	19930721	20030216	COLORED BOX CRAFT PUNCH WITH CIRCULAR BUTTON & DESIGN	CARL JIMUKI KABUSHIKI KAISHA	N
TMK9300514	19930721	20030216	COLORED BOX CRAFT PUNCH WITH CIRCULAR BUTTON & DESIGN	CARL JIMUKI KABUSHIKI KAISHA	N
TMK9300515	19930723	20040108	STANLEY	STANLEY WORKS	N
TMK9300516	19930723	20040108	STANLEY	STANLEY WORKS	N
TMK9300517	19930727	20051109	442	GENERAL MOTORS CORPORATION	N
TMK9300518	19930727	19970827	SEVILLE	GENERAL MOTORS CORPORATION	N
TMK9300519	19930727	20091128	SEDAN DE VILLE	GENERAL MOTORS CORPORATION	N
TMK9300520	19930727	20000724	ZR1	GENERAL MOTORS CORPORATION	N
TMK9300521	19930727	20000410	SATURN EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300522	19930727	20000410	SATURN AND EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300523	19930727	20011029	PONTIAC	GENERAL MOTORS CORPORATION	N
TMK9300524	19930727	20011008	PONTIAC EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300525	19930727	20011231	OLDSMOBILE EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300526	19930727	20011008	OLDSMOBILE	GENERAL MOTORS CORPORATION	N
TMK9300527	19930727	20050618	GUIDE	GENERAL MOTORS CORPORATION	N
TMK9300528	19930727	19980902	GUIDE	GENERAL MOTORS CORPORATION	N
TMK9300529	19930727	19960525	MONTE CAROL	GENERAL MOTORS CORPORATION	N
TMK9300530	19930727	20020728	GTO	GENERAL MOTORS CORPORATION	N
TMK9300531	19930727	19930925	GRAND AM	GENERAL MOTORS CORPORATION	N
TMK9300532	19930727	20090530	GMC TRUCK	GENERAL MOTORS CORPORATION	N
TMK9300533	19930727	19991205	GMC	GENERAL MOTORS CORPORATION	N
TMK9300534	19930727	20080126	GM	GENERAL MOTORS CORPORATION	N
TMK9300535	19930727	20080911	DELCO REMY	GENERAL MOTORS CORPORATION	N
TMK9300536	19930727	20020602	DELCO & DESIGN	GENERAL MOTORS CORPORATION	N
TMK9300537	19930727	19991128	COUPE DE VILLE	GENERAL MOTORS CORPORATION	N
TMK9300538	19930727	20011022	CHEVROLET EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300539	19930727	19970709	CHEVROLET CORVETTE & EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300540	19930727	20020107	CHEVROLET & EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300541	19930727	20011022	CHEVROLET	GENERAL MOTORS CORPORATION	N
TMK9300542	19930727	20091010	CAVALIER	GENERAL MOTORS CORPORATION	N
TMK9300543	19930727	20000529	CAMARO EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300544	19930727	20020714	CADILLAC	GENERAL MOTORS CORPORATION	N
TMK9300545	19930727	20020915	BUICK EMBLEM	GENERAL MOTORS CORPORATION	N
TMK9300546	19930727	20020407	BUICK	GENERAL MOTORS CORPORATION	N
TMK9300547	19930727	19950524	BONNEVILLE	GENERAL MOTORS CORPORATION	N
TMK9300548	19930727	20030531	BLAZER	GENERAL MOTORS CORPORATION	N
TMK9300549	19930727	20060809	BELLINI	M. C. SHOE COMPANY, INC.	Y
TMK9300550	19930727	20090613	BELLINI	M. C. SHOE COMPANY, INC.	Y
TMK9300551	19930727	20091107	BELLINI	M. C. SHOE COMPANY, INC.	Y
TMK9300552	19930727	20020526	NINTENDO AND RACETRACK DESIGN	NINTENDO OF AMERICA INC.	N
TMK9300553	19930727	20030202	NINTENDO SUPER SYSTEM	NINTENDO OF AMERICA INC.	N
TMK9300554	19930727	20021222	SUPER NES	NINTENDO OF AMERICA INC.	N
TMK9300555	19930727	20061202	DETAILS	C. S. F. CORPORATION	N
TMK9300556	19930727	20021201	COTTON WITH DESIGN	COTTON INC.	Y
TMK9300557	19930727	20031025	COTTON WITH DESIGN	COTTON INC.	Y

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9300558	19930727	20040515	MAXI MIX WITH DESIGN	JOSEPH WOLF MBH & CO., KG	N
TMK9300559	19930727	20020804	MIDWAY	MIDWAY MANUFACTURING COMPANY	N
TMK9300560	19930727	20010521	SHELLBACK DESIGN	BROWN & BIGELOW	Y
TMK9300561	19930727	20030323	IMPORTED SILVER TEQUILA PATRON BOTTLE DESIGN	ST. MAARTEN SPIRITS, LTD.	Y
TMK9300562	19930727	20030323	IMPORTED ANEJO TEQUILA PATRON BOTTLE DESIGN	ST. MAARTEN SPIRITS, LTD.	Y
TMK9300563	19930728	20030302	MISCELLANEOUS DESIGN	GARRETT ELECTRONICS, INC.	N
TMK9300564	19930728	20030323	BANCSTRIP	BANCTEC, INC.	N
TMK9300565	19930728	20000417	OUTER BANKS	JASPER TEXTILES, INC.	N
TMK9300566	19930728	20010714	BROOKS	BROOKS SPORTS, INC.	N
TMK9300567	19930728	20030531	QUALIFIER	NORTHWESTERN GOLF COMPANY	N
TMK9300568	19930728	20011201	DURKEE	BURNS PHILP FOOD INC.	N
TMK9300569	19930728	19930812	SPICE ISLANDS	BURNS PHILP FOOD INC.	N
TMK9300570	19930728	20030302	RIDGE AND DESIGN	RIDGE SPORTS, INC.,	Y
TMK9300571	19930728	20010514	MAVERICK DESIGN	BROWN & BIGELOW, INC.	Y
TMK9300572	19930728	20020825	ODOR-END	CDC PRODUCTS CORP.	N
TMK9300573	19930728	20090711	HARDY-BUILT	HARDY-GRAHAM, INC.	N
TMK9300575	19930728	20000605	TRIBE	COTY, INC.	N
TMK9300576	19930728	19951206	COTY 24 WITH DESIGN	COTY, INC.	N
TMK9300577	19930728	19960626	PREFERRED STOCK	COTY, INC.	N
TMK9300578	19930728	20020818	L'EFFLEUR	COTY, INC.	N
TMK9300579	19930728	20010924	WILD MUSK	COTY, INC.	N
TMK9300580	19930728	20030323	GRAVITY	COTY, INC.	N
TMK9300581	19930728	20030126	TRULY LACE	COTY, INC.	N
TMK9300582	19930728	20091205	EX'CLA-MA'TION	COTY, INC.	N
TMK9300583	19930728	20080202	SAND & SABLE	COTY, INC.	N
TMK9300584	19930728	19970419	AIRSPUN	COTY, INC.	N
TMK9300585	19930728	20040925	DUETTE	COTY, INC.	N
TMK9300586	19930728	20080424	L'AIMANT	COTY, INC.	N
TMK9300587	19930728	20111012	EMERAUDE	COTY, INC.	N
TMK9300588	19930728	20040520	L'ORIGAN	COTY, INC.	N
TMK9300589	19930728	20010924	WILD MUSK	COTY, INC.	N
TMK9300590	19930728	20000130	ROADMASTER	ROADMASTER CORPORATION	N
TMK9300591	19930728	20030302	WOOL O THE WEST	FOSTER INDUSTRIES, INC.	Y

SUBTOTAL RECORDATION TYPE 111

TOTAL RECORDATIONS ADDED THIS MONTH 128

DENIAL OF TRADE NAME: "DOVEX INCORPORATED"

ACTION: Denial of trade name "DOVEX INCORPORATED".

SUMMARY: On April 9, 1993, a notice of application was published in the Federal Register (58 FR 18446). The notice advised that the trade name was used by Dovex Incorporated, in connection with cookware.

Following the publication of the notice of recordation, Customs was made aware that a prior user of the trade name who also has U.S. trademark registrations for "DOVEX," and "DOVEX WITH DESIGN," (U.S. Trademark Nos. 1,318,475 and 1,522,824) was recorded in this Office on June 16, 1993. Since Customs recognizes the existence of the trademarks and the prior use of the trade name Dovex Corp., the application of Dovex Inc., is hereby denied.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229 (202–482–6960).

Dated: August 25, 1993.

TIMOTHY P. TRAINER,
Acting Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, September 1, 1993 (58 FR 46267)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–169)

SANWA FOODS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–12–00927

[Plaintiff's Motion for Summary Judgment granted. Defendant's Cross-Motion for Summary Judgment denied. Judgment for plaintiff.]

(Dated August 23, 1993)

Glad & Ferguson (Edward N. Glad), for plaintiff.
Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Mark S. Sochaczewsky), Stephen Berke*, Attorney, United States Customs Service, of counsel, for defendant.

MEMORANDUM OPINION

GOLDBERG, *Judge:* This action comes before the court on plaintiff's Motion for Summary Judgment and defendant's Cross-Motion for Summary Judgment pursuant to Rule 56 of the rules of this court. Plaintiff, Sanwa Foods, Inc., challenges the United States Customs Service's classification of the imported merchandise. The court has jurisdiction under 28 U.S.C. § 1581(a) (1988).

BACKGROUND

Plaintiff is the importer of rolls of continuous lengths of film consisting of polymer ethylene laminated with cellophane which is used for packing, transporting, and marketing various noodle mixes in the United States. The merchandise at issue is imported from Japan and entered the United States at the port of Los Angeles, California between the dates of March 13, 1990 and April 10, 1990. The subject merchandise was classified by the United States Customs Service ("Customs") under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 3920.10.00, which encompasses "[o]ther plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials: [o]f polymers of ethylene." The merchandise was assessed with a duty rate of 4.2 percent *ad valorem*. Plaintiff claims that the proper classification was HTSUS subheading 3923.21.00 which includes sacks and bags for the conveyance or packing of goods of polymers of ethylene and is dutiable at a rate of 3 percent *ad valorem*.

Plaintiff filed timely protests, which were denied by Customs on December 27, 1991. Plaintiff then filed a complaint before this court. Prior to the commencement of this action, plaintiff paid all liquidated duties in the manner and within the time required by law.

On November 3, 1992, plaintiff filed its motion for summary judgment asserting that Customs improperly classified the subject merchandise, and that no genuine material issues of fact remain in dispute. On March 5, 1993 defendant filed a cross-motion for summary judgment, and argued that no issues of fact exist since the merchandise is appropriately classified under HTSUS subheading 3920.10.00.

DISCUSSION

A. *Nature of the Merchandise:*

The parties agree regarding the underlying factual predicate of the case. The parties concede that the merchandise in question consists of color printed cellophane plastic film laminated to a polyethylene plastic. After importation into the United States, the imported merchandise is used to make retail packaging for a noodle product. Defendant's Brief in Support of its Cross-Motion for Summary Judgment ("Defendant's Brief") at 1 and Plaintiff's Brief in Support of its Motion for Summary Judgment ("Plaintiff's Brief") at 1.

B. *Classification of the Merchandise:*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d).

In the case at bar, the parties agree that the merchandise is properly classified only under either HTSUS subheading 3920.10.00 or 3923.21.00.

The HTSUS headings in dispute state:

3920	Other plates, sheets, film, foil and strip, of plastics, noncellular and not reinforced, laminated, supported or similarly combined with other materials:	
3920.10.00	of polymers of ethylene	4.2%
* * * * * * *		
3923	Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics:	
3923.21.00	Sacks and bags (including cones):	
	Of polymers of ethylene	3%

Plaintiff claims that the imported merchandise is not classifiable under HTSUS subheading 3920.10.00 because it is laminated and that provision does not include merchandise that is laminated, regardless of the material used for lamination. Alternatively, plaintiff claims that

HTSUS subheading 3920.10.00 does not include sheets and film of plastics that are laminated with materials other than polymers of ethylene. Since the lamination in this case was made utilizing a cellulosic plastic film which is a different material from a polyethylene plastic film, plaintiff contends that the imported merchandise is not covered by this tariff classification.

Defendant asserts that plaintiff's reading of HTSUS subheading 3920.10.00 is incorrect. Defendant contends that HTSUS subheading 3920.10.00 is broader than claimed by plaintiff, and only excludes film of ethylene laminated with materials other than plastics. Since the subject merchandise is laminated with cellophane and since cellophane is a plastic, the merchandise falls within the scope of the provision.

In evaluating the various claims presented, the court notes at the outset that pursuant to 28 U.S.C. § 2639(a)(1) (1988), it is well settled that Customs' classification is presumed correct, and the burden of proof is upon the party challenging the classification. *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 72, 733 F.2d 873 (1984) *reh'g denied*, 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984). To determine whether an importer has overcome the statutory presumption, the court must consider whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Id.* at 75.

The meaning of a tariff term is a question of law. *Digital Equip. Corp. v. United States*, 8 Fed. Cir. (T) 5, 6, 889 F.2d 267 (1989). Moreover, when a tariff term is not defined in either the HTSUS or its legislative history, the correct meaning of a term in a tariff provision is the common meaning understood in trade or commerce. *Schott Optical Glass Inc. v. United States*, 67 CCPA 32, 34, 612 F.2d 1283 (1979). Finally, a court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities, to determine the common meaning of a tariff term. *Trans-Atlantic Co. v. United States*, 60 CCPA 100, 471 F.2d 1397 (1973).

The court notes that heading 3920 states that non-cellular plastics are *not covered* if they are reinforced, *laminated*, supported or *similarly combined* with *other materials*. The court first examines the General Rules of Interpretation ("GRI") to the HTSUS for guidance in determining the meaning of the tariff provision under review.

GRI 1 states that "for legal purposes, classification shall be determined according to the terms of the headings * * * and, *provided such headings * * * do not otherwise require,* according to the * * * provisions [of the following rules]." (Emphasis added.) GRI 2(b) then goes on to state that "[a]ny reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances." Thus, as a general rule under the HTSUS, a material combined with another material, for example through a process of lamination, would automatically be included within the scope of the heading, unless the wording expressly provides otherwise.

Consequently, the court concludes that the purpose of the wording regarding "lamination" in heading 3920 is not, as suggested by plaintiff, to exclude an article simply because it is laminated. Rather, the purpose is to explicitly limit the scope of the heading so that the general rule expressed in GRI 2(b) with respect to combinations of materials described above does not apply.

Furthermore, the term "other materials" includes cellular plastics. The court is not persuaded by defendant's argument that the term is limited to materials other than plastics, whether noncellular or cellular. For the following reasons the court finds that the defendant interprets the term "other materials" in heading 3920 too narrowly. First, clearly the HTSUS does not treat plastics as one item for classification purposes. Rather, the HTSUS distinguishes between cellular and non-cellular plastics. Thus, the plain language of heading 3920 expressly limits the coverage of that tariff provision to non-cellular plastic articles. Articles of cellular plastics are covered by the explicit terms of heading 3921.[1]

Moreover, upon closer examination, the court finds that noncellular and cellular plastics are, in fact, different materials. According to *Van Nostrand's Scientific Encyclopedia* 546 (7th ed. 1989), cellular plastics are "unique among the plastics in that the basic materials used in their manufacture are not synthetic polymers. Rather, they are derivative of a natural polymer, cellulose." Consequently, the court determines that the term "other materials" for the purpose of heading 3920 refers broadly to all materials other than non-cellular plastics.

This interpretation of the scope of heading 3920 is further supported by the Harmonized Commodity Description and Coding System Explanatory Notes (1986) ("Notes") which are the Customs Cooperation Council's official interpretation of the Harmonized System. In referring to the Notes, the court recognizes that they do not constitute controlling legislative history. Rather, their purpose is to clarify the reach of HTSUS subheadings and to offer guidance in interpreting the subheadings. *See Mita Copystar Corp. v. United States,* No. 93–76 (CIT May 20, 1993).

The Note to HTSUS 3920 states that:

> [t]his heading covers plates, sheets, film, foil and strip of plastics, **other than** those of **heading 39.18** or **39.19**. It does not cover cellular products or those which have been reinforced, laminated, supported or similarly combined with other materials **(heading 39.21)**.

This is essentially the same language that appears in the tariff heading. In the court's view, the clear meaning of this language is that an article is not covered by heading 3920 if it is combined with a cellular plastic material. This is demonstrated to the court by the parenthetical refer-

---

[1] Heading 3921 reads:

Other plates, sheets, film, foil and strip, of plastics:

Cellular:

ence immediately following the words "combined with other materials" to HTSUS heading 39.21, which covers plastic articles made of cellular materials. In addition, lamination is listed as an example of what constitutes combining for the purposes of the provision.

Based on the above, the court determines that heading 3920 does not cover articles that are laminated with materials other than noncellular plastics. Having thus determined, the court must next decide whether the cellophane used to laminate the imported merchandise falls within the category "other materials" for the purposes of subheading 3920.10.00.

The parties agree that cellophane is a plastic. Consequently, the question for the court to determine is whether cellophane is a cellular plastic rather than a non-cellular plastic, and therefore falls outside the scope of that tariff position.

According to *Webster's New World Dictionary* 226 (3d college ed. 1988), cellophane as "a thin, transparent material made from cellulose, used as a moisture-proof wrapping for foods, tobacco, etc." Thus, since cellophane is made of cellulose it falls within the category of cellular plastics not covered by subheading 3920.10.00. On this basis, the court concludes that cellophane is an "other material" for the purposes of HTSUS item 3920.10.00.

Consequently, this court determines that the imported merchandise falls outside the scope of HTSUS item 3920.10.00. The plaintiff has thus overcome the presumption of correctness which attaches to Customs' classification decision.

The court next turns to its examination of plaintiff's claim that the imported merchandise is properly classified under HTSUS 3923.21.00 as sacks and bags of polymers of ethylene for the conveyance or packing of goods at 3 per cent *ad valorem*.

In evaluating plaintiff's classification claim under HTSUS subheading 3923.21.00, the court must weigh the different characteristics of the imported merchandise. Heading 3923 generally covers "[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics * * *." However, in its imported condition, the subject merchandise is incapable of conveyance or packing of goods since it consists of continuous lengths of flat plastic.

The GRI's provide in GRI 2(a) that any reference in a heading to an "article" shall be taken to include article whether incomplete or unfinished. Since nothing in the wording of the subheading precludes application of GRI 2(a), the court determines that subheading 3923.21.00 includes both finished and unfinished articles. Defendant concedes that if the court applies GRI 2(a) to heading 3923 so as to include unfinished articles, the imported merchandise would be covered by the heading. (Defendant's Brief at 7.)

Consequently, the court concludes that the proper classification of the subject merchandise is subheading 3923.21.00, and therefore no genuine issues of fact remain.

Plaintiff has requested this court to direct the defendant to pay interest on excessive duties paid, and that such interest be calculated, pursuant to 28 U.S.C. § 2644 (1988), from the date of the filing of the summons to the date of the actual refund. The court determines that plaintiff's request is appropriate.

CONCLUSION

For the reasons provided above this court holds that no genuine issues of fact remain regarding the classification of the subject merchandise in this action. Accordingly, plaintiff's motion for summary judgment summary judgment is denied.

Therefore, Customs is directed to reliquidate the entries under HTSUS 3923.21.00. Furthermore, it is directed that defendant pay interest on excessive duties paid, and that such interest be calculated, pursuant to 28 U.S.C. § 2644 (1988), from the date of the filing of the summons to the date of the actual refund.

(Slip Op. 93–170)

FORMER EMPLOYEES OF SWISS INDUSTRIAL ABRASIVES, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 92–08–00547

[Action remanded to the Department of Labor.]

(Dated August 23, 1993)

Naida Thomas, pro se, for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice, *(Patricia L. Petty)* for defendant.

MEMORANDUM AND OPINION

GOLDBERG, *Judge:* This action comes before the court on plaintiffs' motion for judgment on the agency record. Plaintiffs challenge the Department of Labor's determination that plaintiffs do not qualify for trade adjustment assistance. The court has jurisdiction pursuant to 28 U.S.C. 1581(d) (1988). Ms. Naida Thomas appeared pro se for plaintiffs.

BACKGROUND

On January 16, 1992, the President of Local 411 of the International Chemical Workers Union ("I.C.W.U."), Ms. Naida Thomas, filed a petition for certification of eligibility for trade adjustment assistance ("TAA") with the Office of Trade Adjustment Assistance, Department of Labor ("Labor") on behalf of all the former workers of Swiss Indus-

trial Abrasives, Alliance, Ohio ("SIA Ohio"). A notice of initiation of an investigation was published by Labor in the Federal Register on February 6, 1992. *Investigation Regarding Certification of Eligibility to Apply for Worker Adjustment Assistance,* 57 Fed. Reg. 4646 (Dep't Labor 1992) (notice of investigation initiation).

The petition stated that the employees produced abrasives in all forms, including industrial wide belts, regular belts, portable belts, sheets, discs, rolls and jumbo rolls at the SIA Ohio plant. The petition also stated that layoffs at the plant began in December, 1990, and that 165 workers would be terminated by the scheduled closing of the plant on February 4, 1992. The petition further alleged that the plant closing was a result of increased imports from the parent company, Swiss Industrial Abrasives of Switzerland ("SIA Switzerland").

The investigation conducted by Labor consisted of a data collection letter dated January 28, 1992 forwarded to Mr. Steve Bias, Director of Human Resources, SIA Ohio. Confidential Record at 14–20. The record does not contain information indicating that Mr. Bias actually responded to this request for information. The investigation also produced a letter from respondent's counsel, Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., dated February 5, 1992 in response to a telephone conference of February 4, 1992 with Labor. Confidential Record at 24. The investigation furthermore produced a copy of the Agreement for Sale & Purchase of Business Assets entered into on December 3, 1991 in connection with the purchase by Sancap Abrasives, Inc. of Alliance, Ohio ("Sancap") of SIA Ohio's assets. The investigation also produced a copy of the Distribution Agreement that SIA Switzerland and Sancap entered into in December of 1991. Under the terms of the agreement Sancap was appointed as SIA Switzerland's exclusive distributor in the United States from the contract year beginning December 1991. Confidential Reel at 24–46.

In addition, the agency record contains the results of a survey of three customers of SIA Ohio. Confidential Record at 47–54. Petitioner provided the names of the three customers surveyed by Labor. The customers were asked whether they had substituted imports for purchases from SIA Ohio.

On April 14, 1992, Labor issued a Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, which was published in the Federal Register on April 27, 1992. *Determination Regarding Eligibility to Apply for Worker Adjustment Assistance,* 57 Fed. Reg. 15331 (Dep't Labor 1992) (negative application determination). Based upon the results of its investigation, Labor concluded that the third criterion of section 222 of the Trade Act of 1974, that increases in imports had "contributed importantly" to the layoffs of the former employees of SIA Ohio, had not been satisfied. Labor specifically concluded that while customers of SIA Ohio had decreased their purchases from SIA Ohio, they had not increased their purchases of imports.

Petitioners filed a request for administrative reconsideration of Labor's notice of negative determination on April 21, 1992. Petitioners argued that, prior to 1980, SIA Ohio had manufactured its own products. The company was then bought by SIA Switzerland, and gradually increased their imports of Swiss material until the plant closed on February 4, 1992. SIA Ohio was then purchased by Sancap, which became a distributor for SIA Switzerland. Confidential Record at 60–61.

In response to information requests from Labor, SIA Switzerland provided statistical information regarding imports and sales by SIA Ohio during the period of investigation ("POI"). Confidential Record at 64–65. Labor then determined that the materials imported by SIA Ohio from SIA Switzerland during the POI were not the same items produced at the Ohio plant, that company imports fell during the POI, and that SIA Ohio was closed because it was a "high cost plant." Labor reiterated its original finding that its survey of the company's major declining customers showed that none imported industrial sandpaper.

On the basis of its findings, Labor subsequently denied petitioners' request for rehearing on July 24, 1992. The denial was published in the Federal Register on August 4, 1992. *SIA of America, Alliance, Ohio*, 57 Fed. Reg. 34318 (Dep't Labor 1992) (negative application for reconsideration determination).

Petitioners subsequently filed a motion for judgment upon the agency record with this court in a timely manner challenging Labor's denial of plaintiff's petition for reconsideration for certification of eligibility for TAA benefits. Plaintiffs claim that Labor's negative determination is not supported by substantial evidence contained in the administrative record and is otherwise not in accordance with law.

STANDARD OF REVIEW

"A negative determination by the Secretary of Labor denying certification of eligibility for [TAA] will be upheld if it is supported by substantial evidence on the record and is otherwise in accordance with law." *Former Employees of General Elec. Corp. v. U.S. Dep't Labor*, 14 CIT 608, 611 (1990); *See also* 19 U.S.C. § 2395(b) (1988). Substantial evidence has been held to be more than a "mere scintilla," but sufficient enough to reasonably support a conclusion. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F.Supp. 961, 966 (1986), *aff'd*, 5 Fed. Cir (T) 77, 810 F.2d 1137 (1987). In addition, the "rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis." *International Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978).

The court may order a remand pursuant to 19 U.S.C. § 2395(b) (1988) if good cause is shown. Good cause has been found, when the agency's investigation "'is so marred that the Secretary's finding is arbitrary or of such a nature that it could not be based on substantial evidence.'" *Local 116 v. U.S. Dep't of Labor*, 16 CIT ____, 793 F.Supp. 1094, 1096 (1992) (citations omitted).

DISCUSSION

To certify a group of workers as eligible for trade adjustment assistance, Labor must find:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, *and*
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a) (1988) (emphasis added). "Contributed importantly" is defined as a "cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(b)(1) (1988).

In the case at bar, the parties agree that production fell at the Ohio plant and that workers were separated due to the plant closing. However, they dispute the cause of the drop in production and consequent separations. Plaintiffs allege that the decline in production and separations were caused by import substitution at the Ohio plant. Defendant claims that the Ohio plant closing was due to high costs. Defendant argues that the company's level of imports fell during the POI and that the imported articles were not like or directly competitive with products manufactured at the SIA Ohio plant. Furthermore, defendant argues that Labor's survey of the company's major declining customers showed that none imported industrial sandpaper. Public Record at 66.

At the outset, the court notes that the TAA provisions state that workers may be eligible for certification if an increase in imports contributes importantly to a decline in "sales *or* production" of a like or directly competitive product and subsequent separation of workers. 19 U.S.C. § 2272(a)(3) (1988) (emphasis added). The plain language of the statute thus clearly allows for certification if a petitioner's claim that outsourcing has contributed importantly to a decline in production and subsequent job elimination, is supported by substantial evidence. Where this is the case, there is no requirement that import substitution also has caused a decline in company sales. Case law confirms this interpretation of the statute. In *United Elec. Radio and Machine Workers of America v. U.S. Dep't Labor*, 14 CIT 121, 731 F. Supp. 1082 (1990), the court sustained Labor's certification of certain parts of a company that produced railway systems when employees lost their jobs because the company substituted imports for manufacturing formerly done at the plant.

Consequently, with this reading of the statute in mind, the court finds that a proper investigation of petitioners' allegations in the case at bar would seek to determine which imported products petitioners allege caused their displacement, and would then ascertain whether these articles were like or directly competitive with articles produced at the Ohio

plant. Finally, the proper investigation would have determined if these imports "contributed importantly" to the petitioners' displacement.

The court now turns to examine the adequacy of Labor's investigation in the instant case. In doing so, the court recalls that Labor possesses considerable discretion in its handling of TAA investigations. Yet, a threshold requirement of reasonable inquiry exists, and investigations that fall below this threshold cannot constitute substantial evidence upon which a determination can be affirmed. "In this regard, courts have observed that 'because of the *ex-parte* nature of the certification process, and the remedial purpose of the trade adjustment assistance program, the Secretary is obliged to conduct his investigation with the utmost regard for the interests of the petitioning workers.'" *Stidham v. U.S. Dep't Labor,* 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (citations omitted). Where Labor conducts an inadequate investigation by failing to make a reasonable inquiry, the court has good cause to remand the case to Labor to take further evidence pursuant to 19 U.S.C. § 2395(b) (1988).

The court has conducted a thorough review of the administrative record that formed the basis for Labor's negative determination in the case at bar. The court does not find the investigation conducted by Labor and the factual basis it provided for Labor's final determination adequate.

First, Labor's denial of certification was based on the determination that the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act was not met. According to Labor, the "contributed importantly" test is generally demonstrated through a survey of the workers' firm's customers to determine whether they have substituted imports for purchases from the company under investigation. Public Record at 66. Labor also applied the customer survey method in the case at bar without questioning its relevancy in evaluating the actual allegations made by petitioner that production rather than company sales had declined due to imports by SIA Ohio.

The court notes that case law has consistently held that while a customer survey may be a reasonable means of ascertaining the existence of a causal nexus between a customer's increased imports and a company's lost sales, the customer survey method does not form an adequate basis for determining whether a company's production has declined due to outsourcing, the question under investigation according to petitioners' claim. *See Former Employees of Monroe Oil & Gas v. U.S. Dep't Labor,* 13 CIT 652 (1989).

Labor also relied on statistical information provided by SIA Switzerland regarding the Ohio plant's sales and imports during the POI. Public Record at 66. Labor, however, failed to clarify several aspects of the information which were incomplete or unclear. First, the statistical information provided by SIA Switzerland did not break down imports and sales along product lines as required under the statute in order to determine the impact of imports on domestic production and employment.

See 19 U.S.C. 2272(a)(3) (1988). Instead, the record indicates that Labor relied exclusively on respondent's unsubstantiated statement that the imported products were not in competition with products being produced domestically.

Next, the statistical information provided by SIA Switzerland failed to specify whether it referred to volume or value as required. In *United Rubber, Cork, Linoleum and Plastic Workers of America, Local 798 v. U.S. Dep't Labor,* 652 F.2d 702 (7th Cir. 1981), the court found that 19 U.S.C. § 2272(a)(3) (1988), which refers to "increases of imports," requires a determination of the volume of imports involved. The court based its decision on the fact that it is possible to have an absolute decrease in the value of imports without necessarily having an absolute decrease in the quantity of imports. Yet, there is no evidence in the administrative record that Labor clarified the figures provided by SIA Switzerland on this point.

Furthermore, upon closer examination, it is the court's view that Labor ignored relevant statistical information provided by SIA Switzerland. While it is true that the figures provided by SIA Switzerland show that imports by SIA Ohio fell during the POI, the figures also show that imports increased as a percentage of actual sales. This indicates to the court that imports might have increased at the expense of domestic production, even as total sales declined. Labor, however, disregarded this information.

Finally, although the Sales and Distribution Agreements between Sancap and SIA Ohio and Sancap and SIA Switzerland comprised the bulk of the materials contained in the administrative record, Labor apparently ignored both in its investigation, even though the agreements contained information that might have been relevant to determining what effect imports had on domestic production. The agreements could have been part of an overall market strategy, whereby SIA Switzerland gradually phased out domestic production at the SIA Ohio plant in favor of a distribution agreement with Sancap serving the market with imports. Confidential Record at 33. Labor, however, did not investigate this further.

Based on all of the above, the court can only characterize Labor's investigation as misguided and inadequate at best. Although it is true that the court must defer to Labor's choice of methodology, the court cannot condone procedures such as those used in the present case. Labor's failure to examine allegations made by petitioners, its failure to require SIA Switzerland to provide full information on the impact of imports on production and employment, its failure to verify information obtained from SIA Switzerland, as well as the use of a customer survey under the circumstances to ascertain information must all be described as unreasonable. The investigation and resulting record, therefore, cannot constitute substantial evidence upon which Labor's determination can be affirmed. Consequently, this case must be remanded to Labor for the purpose of conducting a more complete investigation.

Upon remand, Labor is instructed to examine petitioner's claim that imports by SIA Ohio from SIA Switzerland of like or competitive products caused production and employment to fall at the Ohio plant. This investigation must include verified import and production data sufficiently broken down along product lines to reflect the impact of imports by SIA Ohio upon production. The data must be based on volume rather than value. Finally, Labor must take into account the Sales and Distribution Agreements contained in the record.

CONCLUSION

Accordingly, the court finds that Labor's denial of plaintiffs' petition for certification for eligibility for trade adjustment assistance is not supported by substantial evidence. Therefore, this action is remanded to Labor, with instructions to reinvestigate plaintiffs' petition in accordance with the instructions provided above. Remand results shall be filed with the court within 60 days of the date of this opinion.

(Slip Op. 93–171)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE, S.A., AEROSPATIALE DIVISION HELICOPTERES, AND AEROSPATIALE HELICOPTER CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00562

Plaintiff challenges the following actions by the Department of Commerce, International Trade Administration ("ITA"), alleging that these actions were unsupported by substantial evidence on the administrative record and not in accordance with law: the ITA's (1) use of a methodology for adjusting United States price ("USP") and Foreign Market Value ("FMV") for France's value added tax ("VAT") that granted a circumstance of sale ("COS") adjustment to FMV to achieve tax neutrality; (2) method of calculating cash deposit rates for estimated duties; (3) in regard to exporter's sales price ("ESP") transactions, allowance of an adjustment to FMV for inventory carrying costs; (4) failure to verify SKF France, S.A.'s ("SKF") cost response; (5) treatment of SKF's home market discounts; and (6) treatment of SKF's home market billing adjustments.

Held: This case is remanded to the ITA to add the full amount of VAT paid on each sale in the home market to FMV without adjustment; to determine if SKF's method of reporting discounts in the home market meets the standard required for those discounts to be treated as direct selling expenses and subtracted from FMV or if information on the administrative record does not support deduction as direct expenses, to treat these discounts as indirect selling expenses; to develop a methodology which removes discounts paid on sales of out of scope merchandise from any adjustments made to FMV for SKF's discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of FMV; and to apply 19 C.F.R. § 353.59(a) to determine whether SKF's reported allocated billing adjustments were insignificant and if the ITA determines from information on the administrative record that these adjustments were not insignificant the ITA is directed to deny SKF an adjustment for those allocated billing adjustments. ITA's determination is affirmed in all other respects.

[Plaintiff's motion granted in part and denied in part; case remanded.]

(Dated August 26, 1993)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, Margaret E. O. Edozien, William A. Fennell, Wesley K. Caine, Myron A. Brilliant, Robert A. Weaver, Amy S. Dwyer, David Scott Nance and *Patrick J. McDonough)* for plaintiff.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley and *Joseph A. Perna, V)* for plaintiff-intervenor Federal-Mogul Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan);* of counsel: *John D. McInerney,* Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys* and *D. Michael Kaye,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Scott A. Scheele, Alice A. Kipel, Thomas J. Trendl and *Juliana M. Cofrancesco)* for defendant-intervenors SKF USA Inc. and SKF France, S.A.

Rogers & Wells (William Silverman and *Ryan Trainer)* for defendant-intervenor Aerospatiale Division Helicopteres and Aerospatiale Helicopter Corporation.

Opinion

Tsoucalas, *Judge:* Plaintiff, The Torrington Company ("Torrington"), commenced this action to challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of antifriction bearings from France. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Final Results of Antidumping Duty Administrative Reviews ("Final Results"),* 56 Fed. Reg. 31,748 (1991). Substantive issues raised by the parties in the underlying administrative proceeding were addressed by the ITA in the issues appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Issues Appendix"),* 56 Fed. Reg. 31,692 (1991).

Background

On June 11, 1990, the ITA initiated an administrative review of imports of ball bearings, cylindrical roller bearings, spherical plain bearings and parts thereof from France. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990).

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 11,178 (1991).

On July 11, 1991, the ITA published its Final Results in this proceeding. *Final Results,* 56 Fed. Reg. 31,748.

Torrington moves pursuant to Rule 56.1 of the Rules of this Court for summary judgment on the agency record alleging that the following actions by the ITA were unsupported by substantial evidence on the administrative record and not in accordance with law: the ITA's (1) use of a methodology for adjusting United States price ("USP") and Foreign Market Value ("FMV") for France's value added tax ("VAT") that granted a circumstance of sale ("COS") adjustment to FMV to achieve tax neutrality; (2) method of calculating cash deposit rates for estimated duties; (3) in regard to exporter's sales price ("ESP") transactions, allowance of an adjustment to FMV for inventory carrying costs; (4) failure to verify SKF France, S.A.'s ("SKF") cost response; (5) treatment of SKF's home market discounts; and (6) treatment of SKF's home market billing adjustments. *Memorandum in Support of Plaintiff The Torrington Company's Motion for Judgment on the Agency Record ("Torrington's Memorandum")* at 7–43.

DISCUSSION

This Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Circumstance of Sale Adjustment to FMV for Value Added Tax:*

Torrington challenges the ITA's use of a methodology for adjusting USP and FMV for France's VAT that granted a COS adjustment to FMV to achieve tax neutrality. *Torrington's Memorandum* at 21–24.

Defendant argues that its actions were supported by substantial evidence on the administrative record and otherwise in accordance with law. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Defendant's Memorandum")* at 17–44.

For a more detailed discussion of Torrington and defendant's arguments on this issue, see this Court's decision in *Torrington Co. v. United States,* 17 CIT ____, ____, 818 F. Supp. 1563, 1567–69 (1993).

SKF agrees with the defendant's arguments on this issue. *Opposition of SKF USA Inc. and SKF France, S.A. to Torrington's Motion for Judgment on the Agency Record ("SKF's Opposition")* at 13–16.

This Court has fully addressed these arguments and adheres to its decision on this issue in *Federal-Mogul Corp. v. United States,* 17 CIT ____, ____, 813 F. Supp. 856, 863–65 (1993). This Court remands this issue to the ITA to allow the ITA to add the full amount of VAT paid on home market sales to FMV without adjustment.

2. *Calculation of Cash Deposit Rates:*

In this administrative review, the ITA used two different methodologies for the actual calculation of dumping margins in cases where ESP sales were used: one for assessing duties on entries covered by the review, and the other for setting the cash deposit rate on future entries of the subject merchandise. *Final Results,* 56 Fed. Reg. at 31,750–51; *Issues Appendix,* 56 Fed. Reg. at 31,698–702. To calculate the assessment rate for ESP sales, the ITA "divide[d] the total PUDD [potential uncollected dumping duties – calculated as the total difference between foreign market value and U.S. price for an exporter] for the reviewed sales by the *total entered value* of those reviewed sales * * *." *Issues Appendix,* 56 Fed. Reg. at 31,689–99 (emphasis added). To calculate the estimated cash deposit rate for ESP sales, the ITA "divided the total PUDD for each exporter by the *total net U.S. price* for that exporter's sales * * *." *Id.* at 31,699 (emphasis added).

Torrington argues that the ITA's use of a methodology which results in an estimated cash deposit rate different from the assessment duty rate was unsupported by substantial evidence on the record and not in accordance with law. *Torrington's Memorandum* at 38–43.

Defendant argues that its actions were supported by substantial evidence on the administrative record and otherwise in accordance with law. *Defendant's Memorandum* at 53–60. In addition, defendant argues that this issue is moot because of the publication of superseding cash deposit rates in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 28,360 (1992). *Defendant's Memorandum* at 50–53.

For a more detailed discussion of Torrington and defendant's arguments on this issue, see this Court's decision in *Torrington Co.,* 17 CIT at ____, 818 F. Supp. at 1569.

SKF agrees with the defendant's arguments on this issue. *SKF's Opposition* at 21–25.

The Court agrees with the defendant that this issue is now moot. However, the Court directs the defendant to this Court's decision on this issue in *Federal-Mogul,* 17 CIT at ____, 813 F. Supp. at 866–68.

3. *Inventory Carrying Costs:*

In the Final Results of this administrative review the ITA correctly adjusted ESP for imputed inventory carrying costs pursuant to 19 U.S.C. § 1677a(e)(2) (1988). Torrington does not challenge this adjustment.

Pursuant to its new administrative practice, the ITA also made a corresponding adjustment to FMV for imputed inventory carrying costs when comparing ESP sales to FMV sales.

Torrington objects to this adjustment by the ITA to FMV for imputed inventory carrying costs. *Torrington's Memorandum* at 14–20.

For a detailed discussion of Torrington and defendant's arguments on this issue, see this Court's decision in *Torrington Co.*, 17 CIT at ____, 818 F. Supp. at 1574–77.

SKF agrees with the defendant's arguments on this issue. *SKF's Opposition* at 9–12.

This Court adheres to its decision on this issue in *Torrington Co.*, 17 CIT at ____, 818 F. Supp. at 1576–77, and finds that the ITA's adjustment to FMV for imputed inventory carrying costs pursuant to 19 C.F.R. § 353.56(b)(2) (1991) was a reasonable exercise of the ITA's discretion in implementing the antidumping duty statute and is affirmed.

4. *Failure to Verify SKF's Cost Response:*

On October 5, 1990, Torrington requested the ITA to conduct verification of all responses submitted in this administrative review, including SKF's cost response, pursuant to 19 U.S.C. § 1677e(b) (1988) and 19 C.F.R. § 353.36 (1991).[1] Administrative Record France Public Document No. ("AR Fra. Pub. Doc. No.") 118. SKF had not yet submitted its cost response to the ITA. AR Fra. Pub. Doc. No. 124.

After SKF submitted its cost response, Torrington renewed its request for verification alleging that SKF's cost response was missing important information and that some of the information reported was inconsistent. AR Fra. Pub. Doc. Nos. 149, 164, 186, 205.

After the outbreak of the Persian Gulf War, the ITA decided to cancel verification of certain respondent's information. In a letter dated January 25, 1991, Torrington refers to the ITA's decision not to verify SKF's cost response and goes on to request the ITA to reschedule the verifications it was canceling or for the ITA to conduct limited verification in Washington, D.C. AR Fra. Pub. Doc. No. 186. The ITA refused Torrington's request.

---

[1] 19 U.S.C. § 1677e(b) states in pertinent part:

(B) Verification

The administering authority shall verify all information relied upon in making–

* * * * * * *

(3) a review and determination under section 1675(a) of this title, if–

(A) verification is timely requested by an interested party * * *, and

(B) no verification was made under this paragraph during the 2 immediately preceding reviews and determinations under that section of the same order, finding, or notice, *except that this clause shall not apply if good cause for verification is shown.*

(Emphasis added).

Since this was the first review of the outstanding antidumping duty order regarding antifriction bearings from France, the ITA was only required to conduct verification if timely requested by an interested party and only if good cause for verification was shown.

The relevant section of the ITA's regulations state:

§ 353.36 Verification of information.

(a) *In general.* (1) The Secretary will verify all factual information the Secretary relies on in:

* * * * * * *

(iv) The final results of an administrative review under § 353.22(c) or (f) if the Secretary decides that good cause for verification exist; and

(v) The final results of an administrative review under § 353.22(c) if:

(A) An interested party * * * not later than 120 days after the date of publication of the notice of initiation of review, submits a written request for verification; and

(B) The Secretary conducted no verification under this paragraph during either of the two immediately preceding administrative reviews.

19 C.F.R. § 353.36.

Torrington argues that 19 U.S.C. § 1677e(b)(3)(B) requires the ITA to verify all information used in an administrative review "if good cause for verification is shown." Torrington cites to the House of Representatives Ways and Means Committee's report on the Trade Remedies Reform Act of 1984, which was later incorporated into the Trade and Tariff Act of 1984, for a definition of "good cause." The Report states that "[g]ood cause could be such factors as a significant issue of law or fact, changed or special circumstances, discrepancies found in previous verifications, or the likelihood of a significant impact on the result." H.R. Rep. No. 725, 98th Cong., 2d Sess. 43 (1984). Torrington argues that anytime these or comparable,circumstances are shown to exist, verification is required. *Torrington's Memorandum* at 9–11.

Torrington argues that the analysis of SKF's cost response that it presented to the ITA showed that discrepancies in the response proved that good cause existed for verification of SKF's cost response. *Id.* at 7–8, 11–12. Torrington argues that at a minimum the ITA should have conducted a modified form of verification of SKF's cost response in Washington, D.C. *Id.* at 12–13.

Torrington also points out that verification of SKF's cost response in the original less-than-fair-value investigation turned up discrepancies which the ITA required SKF to remedy. *Id.* at 11–12.

Defendant argues that Torrington waived its request for verification by not specifically raising the issue of the ITA's failure to verify SKF's cost response in its case or rebuttal briefs before the administrative agency. As a result, the ITA was unaware that this was an issue which Torrington continued to pursue and did not specifically address it in the Final Results. *Defendant's Memorandum* at 3–4 n.4.

Defendant also argues that Torrington failed to show that good cause for verification of SKF's cost response existed. Defendant argues that the ITA correctly requires more than mere speculation by a party requesting verification in order for the ITA to find that good cause for verification exists. Defendant argues that the ITA will not find good cause to verify if a request to verify is made prior to the submission of the data to be verified. Defendant also argues that the ITA will not find good cause to verify if the ITA finds that a respondent has addressed any perceived deficiencies in its responses and the party requesting verification has not shown that any remaining deficiencies will have an impact on dumping margins. *Defendant's Memorandum* at 5–6.

Specifically, defendant argues that the ITA evaluated SKF's cost response, deficiency responses and its other responses and found the information submitted to be credible. Therefore, the ITA determined that there was no need to verify SKF's cost response. *Id.* at 7–8.

Defendant also points out that Torrington failed to substantiate that any remaining problems with SKF's cost response would have a significant effect on SKF's dumping margin. *Id.* at 8.

Finally, defendant points out that the ITA did consider conducting limited verifications in Washington, D.C., but rejected the idea for logis-

tical and procedural reasons. Defendant states that the largest problem with verifications in Washington was that the ITA could not rely on the veracity of documents submitted under such a procedure. *Id.* at 9–10.

SKF agrees with the defendant's arguments on this issue. *SKF's Opposition* at 5–9.

As an initial matter, this Court finds that Torrington did not waive its request for verification because it did discuss the failure to verify in its general issues case brief. Administrative Record General Issues Document No. 146. In addition, there is no support for Torrington's contention that the ITA should have conducted limited verification in Washington, D.C.

After examining the administrative record, this Court finds that the ITA sent SKF a deficiency letter requesting SKF to supplement its cost response to deal with many of the problems identified by Torrington. AR Fra. Pub. Doc. No. 142. SKF provided all the information requested by the ITA. AR Fra. Pub. Doc. No. 159. ITA deemed SKF's cost response and supplemental submissions adequate and used SKF's cost data for the Final Results.

Torrington argues that if good cause, defined "as a significant issue of law or fact, changed or special circumstances, discrepancies found in previous verifications, or the likelihood of a significant impact on the result" or comparable circumstances, exist, the ITA is *required* to conduct verification. *See Torrington's Memorandum* at 9 *(quoting* H.R. Rep. No. 725, 98th Cong., 2d Sess. 43). The above quotation represents examples of what Congress thought *could* be considered good cause. Nothing leads this Court to the conclusion that the presence of any one of these circumstances requires the ITA to conduct verification.

Torrington argues that there were significant issues of fact in dispute in regard to SKF's cost response and that there had been significant problems with verification in the less than fair value investigation. However, the ITA was aware of these issues and specifically dealt with, and resolved them, to its satisfaction. AR Fra. Pub. Doc. Nos. 142, 159.

However, this Court believes the ITA goes too far in arguing that a party requesting verification for good cause must be able to substantiate the degree of impact alleged problems will have on the respondent's dumping margin. All that is required is that the party requesting verification present a reasonable argument that there will be a significant impact. This does not mean that the party must exactly quantify the impact on the dumping margin.[2]

But even a showing of a potentially significant impact on dumping margins is not enough. The statute and regulations clearly leave to the ITA's discretion the determination of whether good cause for verification exists. 19 U.S.C. § 1677e(b); 19 C.F.R. § 353.36(a)(iv). If the ITA is satisfied with a respondent's data and determines that good cause to verify does not exist, and the ITA's determination is supported by sub-

[2] In certain cases a significant impact could be 0.01% if it means the difference between assessment of duties and having a *de minimis* margin.

stantial evidence on the administrative record, this Court will uphold the ITA's determination. 19 U.S.C. § 1516a(b)(1)(B).

As discussed above, the ITA closely examined SKF's cost response, requested additional information, and decided that good cause for verification did not exist. This Court finds that in this case, the ITA's determination was supported by substantial evidence on the administrative record and is affirmed.

5. *SKF's Home Market Discounts:*

In the Final Results of this administrative review, the ITA stated that in regard to discounts:

> The Department generally allows adjustments to home market price and USP for discounts and rebates where respondents have granted and paid them on sales of subject merchandise to unrelated parties during the period of review. Such discounts or rebates should be part of a respondent's standard business practice and not intended to avoid potential antidumping duty liability. The Department generally makes an adjustment if discounts and rebates, granted pursuant to accurately and adequately described programs, are properly reported on a sale or customer-specific basis and are directly associated with the products or sales under consideration.
>
> * * * * * * *
>
> SKF: SKF granted rebates on a customer-specific basis. The Department verified that rebates per customer were accrued for sales which occurred during an agreed-upon time period or up to a certain agreed-upon amount, and then paid to the customer. We traced from payments of rebates to documentation justifying why the payments were made. SKF demonstrated that its rebates were legitimate and based on agreements. For the purpose of allocating rebates for this review, SKF divided the total rebates given to each customer during a given time period by the total sales to that customer. We found the allocation of discounts and rebates by SKF-FRG, SKF-France, and SKF-Italy to be consistent and reasonable; therefore, we have not changed our calculations from the preliminary determination.

Issues Appendix, 56 Fed. Reg. at 31,717–18.

Torrington argues that discounts relate directly to price and therefore an adjustment to FMV, as the ITA made here, should not be allowed unless SKF demonstrates a direct relationship between a specific discount and a specific sale. Torrington alleges that SKF allocated discounts over all sales without showing that each individual sale was subject to a discount. Torrington argues that allocation is allowed only when a respondent shows on the record that all sales of the subject merchandise were eligible for, and received, a discount. *Torrington's Memorandum* at 32–37.

Defendant concedes that it incorrectly treated SKF's home market discounts as directly related expenses to be deducted from FMV. Defendant states that this Court's decision in *Koyo Seiko Co. v. United States*,

16 CIT ____, ____, 796 F. Supp. 1526, 1529–30 (1992), requires that direct selling expenses be shown to have a reasonably direct relationship to the sales under consideration. Defendant alleges that this direct relationship was not demonstrated if discounts were incurred on a transaction-specific basis but were allocated over all sales on a customer-specific basis as SKF did here. Therefore, defendant requests this Court to remand this issue to the ITA "for reconsideration of those home market cash discounts that were not reported on a transaction-specific or model-specific basis and recalculation of foreign market values where warranted * * *." *Defendant's Memorandum* at 50.

SKF admits that it allocated all home market discounts for SKF France, S.A. over all home market sales due to the manner in which SKF France, S.A.'s records were kept. *SKF's Opposition* at 21.

SKF argues that it was reasonable for the ITA to accept SKF's method of reporting discounts and requests this Court to sustain the ITA's actions in regard to this issue.

In addition, SKF argues that it has been caught by surprise by the defendant's change of position on this issue. SKF argues that there is no statutory basis for the defendant to change its position in regard to its final administrative determination after judicial review of that determination has commenced. *Reply Brief of SKF USA Inc. and SKF France, S.A. ("SKF's Reply")* at 3–4. SKF argues that the ITA's unilateral decision to reverse its position in regard to SKF's discounts denied SKF due process by not allowing SKF the opportunity to comment on the ITA's new position and possibly correct problems with its information submission. *Id.* at 4–6.

SKF argues that the ITA's articulation of a new standard in regard to granting adjustments for discounts which will be given retroactive effect was unfair and unlawful. SKF points out that retroactive application of the law is frowned upon, citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). *SKF's Reply* at 7–10.

SKF also argues that it has relied on the ITA's previous position on this issue in its efforts to try to eliminate dumping by the company. The change in the ITA's position may result in the creation of dumping margins during the second, third and part of the fourth administrative reviews which would not have existed under the ITA's old methodology. *SKF's Reply* at 10–15.

SKF argues that *Koyo Seiko*, 16 CIT at ____, 796 F. Supp. at 1529–30, does not invalidate the reporting methodology used by SKF for discounts. *SKF's Reply* at 15–17.

SKF argues that the ITA's new transaction-specific standard should be rejected. *Id.* at 19–20. However, if this Court finds the ITA's new standard to be reasonable and in accordance with law, SKF requests the Court to determine that SKF has met the new standard. *Id.* at 21–22. At a minimum, SKF requests this Court to direct the ITA to allow an indirect adjustment to FMV for SKF's discounts. *Id.* at 23–24.

Torrington argues that it is well settled that the ITA may request a remand to correct errors in its application of the law as well as other types of clerical errors. *Surreply of The Torrington Company to the Reply Brief of the SKF Companies.*

As an initial matter, this Court finds that SKF's argument that the defendant is precluded from requesting a remand when it believes that it has incorrectly applied the law is completely without foundation. As this court has stated:

> The law is clear that remand is appropriate where an agency has followed an improper method in making a determination or where there has been a defect in the agency's finding. *See, e.g., Ford Motor Co. v. NLRB,* 305 U.S. 364, 374–75 (1939); *Greene County Planning Bd. v. Federal Power Comm'n,* 559 F.2d 1227 (2d Cir. 1977) (en banc), *cert. denied,* 434 U.S. 1086 (1978).

Timken Co. v. United States, 7 CIT 319, 320 (1984).

As to the merits of this issue, the Court of Appeals for the Federal Circuit has stated that in order for a discount or rebate to qualify as a direct cost to be subtracted from FMV, the discount or rebate must have been actually paid on all of the sales under consideration and allocated on the basis of actual cost and sales figures. *Smith-Corona Group v. United States,* 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). In *Koyo Seiko,* 16 CIT at ____, 796 F. Supp. at 1530, this Court upheld the ITA's treatment of Koyo Seiko Co., Ltd.'s ("Koyo Seiko") post sale price adjustments as indirect selling expenses because these post sale price adjustments could not be directly correlated with sales of the subject merchandise using verified cost and sales information. In addition, this Court has found that rebates paid on out of scope merchandise may not be used in the calculation of deductions for expenses from FMV for in-scope merchandise. *Torrington Co.,* 17 CIT at ____, 818 F. Supp. at 1578–79.

The statute and the ITA have a preference for respondents to provide actual expense information as opposed to allocated expense information. As a result, the ITA generally gives respondents an incentive to provide the ITA with actual expense information. The ITA does this by classifying actual expense information in a way which gives greater benefit to the respondent and classifying allocated information in a way which gives a respondent less benefit. This can lead to differing treatment of the same kind of expenses in the calculation of USP and FMV.

A respondent benefits by having home market expenses characterized as direct because generally FMV will be adjusted only for direct expenses. 19 U.S.C. § 1677b(a)(4)(B) (1988); *Consumer Prods. Div., SCM Corp. v. Silver Reed America Inc.,* 753 F.2d 1033, 1037–38 (Fed. Cir. 1985). If the respondent fails to meet the standard for receiving a direct adjustment to price for its home market expenses, the expense will be treated as an indirect expense because this treatment is adverse to the respondent. 19 C.F.R. § 353.56(b)(2) (indirect selling expenses deducted from FMV only in relation to ESP transactions and only up to

amount of indirect selling expenses deducted from USP). Allocated expenses in the U.S. market are treated as direct expenses because direct expenses will be deducted from all USP transactions which will, therefore, reduce USP and potentially increase dumping margins. 19 U.S.C. § 1677a(d)(2)(A) (1988). If these expenses were treated as indirect expenses, they would only be deducted from USP in regard to ESP transactions and will, therefore, reduce USP and potentially increase the dumping margin only for ESP transactions. 19 U.S.C. § 1677a(e)(2) (1988). Therefore, treatment of these expenses as indirect expenses would destroy any incentive a respondent has to provide the ITA with actual expense information. This court has affirmed this method of providing an incentive for respondents to provide actual expense information. *Timken Co. v. United States,* 11 CIT 786, 804, 673 F. Supp. 495, 512–13 (1987).

It is clear that discounts can be deducted from FMV if the actual expense information is reported to the ITA on a transaction-specific or product-specific basis. 19 U.S.C. § 1677b(a)(4)(B). It is also clear that discounts paid on the subject merchandise can be allocated over all sales of the subject merchandise as long as discounts paid only on the subject merchandise are used to calculate the per-unit amount of discount to be deducted and the discounts "can be directly correlated with specific merchandise using verified cost and sales information." *Smith-Corona,* 713 F.2d at 1580. If a respondent is unable to provide the ITA with transaction-specific or product-specific discount amounts, the ITA must look to the information provided by the respondent to determine if the reported allocated discounts were only made on and allocated to sales of the subject merchandise and can be tied to verified cost and sales data. In order for the ITA to accept discounts or rebates allocated on a customer-specific basis as direct costs, the percentage amount of each discount or rebate paid must be the same for each type of the subject merchandise sold and the total amount of discounts or rebates paid to each customer must be allocated over all sales of the subject merchandise made to that customer. If this relationship is not shown to the satisfaction of the ITA, but the aggregate amounts of discounts paid on the subject merchandise have been verified, the discounts are to be treated as indirect selling expenses. *Koyo Seiko,* 16 CIT at ____, 796 F. Supp. at 1530.

Therefore, this Court remands this issue to the ITA to determine if SKF's method of reporting discounts in the home market meets the standard required for those discounts to be treated as direct selling expenses and subtracted from FMV. If the information on the administrative record does not support treatment of these discounts as direct expenses, the ITA will treat these discounts as indirect selling expenses since the ITA has already verified the total amounts in question. AR Fra. Pub. Doc. No. 192. In addition, this Court cannot tell on the basis of the administrative record if discounts paid on SKF's sales of out of scope merchandise were used in the calculation of the adjustment to FMV

for SKF's home market sales discounts. This Court cannot allow the ITA to use a methodology which allows for the inclusion of discounts paid on out of scope merchandise in calculating adjustments to FMV and ultimately the dumping margins. *Torrington Co.*, 17 CIT at ___, 818 F. Supp. at 1579. Therefore, upon remand the ITA is directed to develop a methodology which removes discounts paid on sales of out of scope merchandise from any adjustments made to FMV for discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of FMV.

6. *Treatment of SKF's Home Market Billing Adjustments:*

For SKF France, S.A., SKF reported all billing adjustments which were greater than 5% of gross unit price and more than 100 French francs. For all other SKF subsidiaries in France, SKF reported all adjustments made to invoice price that were greater than 5% of gross unit price. AR Fra. Pub. Doc. No. 114. For billing adjustments which were below this threshold, SKF reported the aggregate amount of adjustments and allocated them over all sales of the subject merchandise as indirect selling expenses. *Id.* ITA accepted SKF's reporting and allocation methodology for billing adjustments. *Issues Appendix*, 56 Fed. Reg. at 31,726.

Torrington argues that the ITA erred by granting SKF an indirect adjustment to FMV for billing adjustments which were reported in aggregate amounts and allocated over all sales. Specifically, Torrington argues that the ITA abdicated its responsibility to obtain all information necessary to correctly calculate FMV by allowing SKF to control the data submitted by deciding what information in what form it would submit to the ITA regarding billing adjustments. *Torrington's Memorandum* at 25–28.

Torrington relies on *Timken Co. v. United States*, 10 CIT 86, 94–100, 630 F. Supp. 1327, 1336–40, where the respondent was allowed to submit sales data only in regard to models of merchandise sold in the home market which it determined were similar to the merchandise sold in the U.S. market subject to the antidumping duty order. This court remanded the case to the ITA to collect all information necessary to allow the agency to determine for itself what the most similar merchandise was and to require the respondent to then submit sales information in regard to those models. *Id.*; *Torrington's Memorandum* at 27–28.

Torrington argues that the ITA erred by allowing SKF to determine which billing adjustments should be reported on a transaction-specific basis and which adjustments to allocate over all sales. Torrington points out that by allocating billing adjustments to all sales SKF may have been able to reduce or eliminate dumping margins which would otherwise be found by the ITA. As an example, if the adjustment was an increase in price of 4.99%, SKF may not have reported it. However, if the dumping margin resulting from a comparison of this transaction with a U.S. sale was under 5%, the failure to report the actual adjustment could lead to a finding of no dumping. *Id.* at 28–30.

Defendant argues that 19 U.S.C. § 1677f–1(a) (1988) allows the ITA to disregard insignificant circumstance of sale adjustments. Defendant argues that neither the statute nor the regulations define what an insignificant adjustment is.[3] Therefore, defendant argues that the ITA has been granted broad discretion to determine what constitutes insignificant adjustments which can be disregarded. Defendant argues that the billing adjustments which SKF allocated over all sales were insignificant in regard to SKF's total home market sales volume and, therefore, ITA acted in accordance with law in not requiring SKF to report this data. *Defendant's Memorandum* at 45–46.

Defendant argues that the ITA correctly treated billing adjustments which were not reported on a transaction-specific basis as indirect selling expenses. As discussed earlier in this opinion, defendant argues that when transaction-specific home market expenses are not reported on a transaction-specific basis but are allocated over all sales, the ITA is correct to treat these expenses as indirect selling expenses as this treatment grants respondent unfavorable treatment for these expenses. *Id.* at 47–49.

SKF points out that it did report all billing adjustments but that Torrington is contesting the method by which SKF reported these adjustments. SKF argues that the ITA acted well within its discretion in accepting SKF's reporting methodology. SKF also points out that its reporting methodology is as likely to create dumping margins where none may exist as it is to hide them. *SKF's Opposition* at 16–19.

Defendant argues that the statute and the ITA's regulations do not define what constitutes an "insignificant" COS adjustment which can be disregarded pursuant to 19 U.S.C. § 1677f–1(a)(2). *Defendant's Memorandum* at 45–46. However, the Court finds that this is not true. ITA's own regulation defines "insignificant adjustments" stating:

> **§ 353.59 Disregarding insignificant adjustments; use of averaging and sampling.**
>
> (a) *Insignificant adjustments.* The Secretary may disregard adjustments to foreign market value which are insignificant. Ordinarily, the Secretary will disregard individual adjustments having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the foreign market value. Groups of adjustments are differences in circumstances of sale, differences in the physical characteristics of the merchandise, and differences in the levels of trade.

---

[3] 19 U.S.C. § 1677f–1 states in pertinent part:

§ 1677f–1. Sampling and averaging

(a) In general

For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority may—

* * * * * * *

(2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

19 C.F.R. § 353.59(a) (1991). Defendant argues that 19 C.F.R. § 353.59(a) does not apply to the situation presented by SKF's allocation of certain billing adjustments to all home market sales. *Defendant's Memorandum* at 45–46.

This Court cannot understand why the ITA would believe that 19 C.F.R. § 353.59(a) does not apply to this situation. It is clear that this regulation applies when the ITA is making a determination as to whether any adjustment to FMV is insignificant and can, therefore, be disregarded in the calculation of FMV. According to defendant, "[t]he billing adjustments not reported by SKF for two of its subsidiaries were considered by Commerce to be insignificant." *Defendant's Memorandum* at 46. However, the ITA did not apply its own regulation to make this determination.

According to 19 C.F.R. § 353.59(a), any single adjustment which would have an *ad valorem* effect of over 0.33% on FMV will not be disregarded by the ITA in its calculation of FMV. Therefore, in this case, the ITA was required to determine if SKF's billing adjustments which it allocated over all sales would have reached this threshold based on information in the administrative record. If the ITA determined that the billing adjustments SKF reported in aggregate and allocated over all sales may have reached this threshold, then the ITA was required to obtain specific information on these billing adjustments and factor these adjustments into its calculation of FMV.

As a general matter, this Court agrees with defendant that transaction-specific adjustments to FMV reported as a verified aggregate amount and allocated over all sales can be treated as indirect selling expenses. However, given the facts of this case, the Court does not believe that SKF has met its burden of showing that it deserves an indirect adjustment.

SKF took upon itself the authority to determine a cutoff point at which it would no longer report transaction-specific billing adjustments. For transactions which had billing adjustments which were above this threshold, SKF did report all billing adjustments on a transaction-specific basis. Therefore, it is clear that SKF could have reported all billing adjustments on a transaction-specific basis had it chosen to do so.

ITA decided to accept SKF's reporting methodology because it found SKF's aggregate billing adjustments to be insignificant. Evidence on the administrative record suggests that the allocated billing adjustments may not in fact be insignificant pursuant to 19 C.F.R. § 353.59(a). AR Fra. Confidential Doc. No. 35. The ITA does not have authority to ignore significant adjustments to FMV. Neither can the ITA abdicate its responsibility to determine what information a respondent must report in order to receive adjustments to FMV. *Timken*, 10 CIT at 94–100, 630 F. Supp. at 1336–40.

Therefore, this issue is remanded for the ITA to apply 19 C.F.R. § 353.59(a) to determine whether SKF's reported billing adjustments which it classified as *de minimis* and allocated over all sales were insignificant. If the ITA determines from information on the administrative record that these adjustments were not insignificant, the ITA is directed to deny SKF an adjustment for those billing adjustments as a respondent cannot be allowed to determine what information it will provide to the ITA as proof of significant adjustments to FMV.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to the ITA to add the full amount of VAT paid on each sale in the home market to FMV without adjustment; to determine if SKF's method of reporting discounts in the home market meets the standard required for those discounts to be treated as direct selling expenses and subtracted from FMV or if information on the administrative record does not support deduction as direct expenses, to treat these discounts as indirect selling expenses; to develop a methodology which removes discounts paid on sales of out of scope merchandise from any adjustments made to FMV for SKF's discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of FMV; and to apply 19 C.F.R. § 353.59(a) to determine whether SKF's reported billing adjustments which it classified as *de minimis* and allocated over all sales were insignificant. If the ITA determines from information on the administrative record that these adjustments were not insignificant, the ITA is directed to deny SKF an adjustment for those allocated billing adjustments. ITA's determination is affirmed in all other respects. Remand results are due within sixty (60) days of the date this opinion is entered. Any comments or responses by the parties to the remand results are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

Index

Customs Bulletin and Decisions
Vol. 27, No. 37, September 15, 1993

U.S. Customs Service

Treasury Decisions

General Notices

U.S. Court of International Trade

Slip Opinions

U.S. G.P.O. 1993–343–018–60061